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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 576

GENERAL AMERICAN TRANSPORTATION CORPORATION,
Petitioner,

VS.

INDIANA HARBOR BELT RAILROAD COMPANY AND BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
Respondents.

RESPONDENTS' REPLY TO PETITIONER'S PETITION FOR CERTIORARI.

Indiana Harbor Belt Railroad Company and Baltimore and Ohio Chicago Terminal Railroad Company,
Respondents.

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STATEMENT OF THE CASE.

Petitioner has made no attack upon the findings of fact made in the opinion of the Court of Appeals, and, insofar as its petition for a writ of certiorari at this time is concerned, respondents rely upon and adopt the facts as stated by the Court of Appeals.

However, respondents respectfully desire, in addition, to challenge some of the statements of fact contained in the petition herein. Petitioner, on page 4, states that the carloads had been shipped "under export tariffs calling for shipside delivery". This is incorrect. The tariff referred to (Item 350-K of Tariff 1016-I) provided that "rates in this tariff apply to shipside" (R. 294, 146), and "where such

rates apply to shipside" and "under rates applying to shipside" export freight will be "placed on tracks on docks, wharves or piers" (R. 146). This is the only basis for petitioner's contention of shipside delivery. This was the original tariff; and, as shown by the opinion of the Court of Appeals, when, at the request of the consignee, the carloads were unloaded into storage, the rate then became not to shipside but became a rate "applicable from point of origin to the place of storage", (R 295, 151); and all subsequent storage charges, reloading charges, and switching charges were to be paid by the consignee, (R. 303, 80, 84); and, as stated by the Court of Appeals, "switching to the storage place and unloading there used up all of the transportation charges which had been prepaid", (R. 303).

On page 5 of the petition, it is stated that the terminal rail carrier had arranged to unload the carloads at a designated storage place on its premises, leaving the inference that this was done entirely upon the volition of the terminal company. This is incorrect in that, as shown by the opinion of the Court of Appeals, prior to the arrival of the shipments at Texas City, arrangements had been made by a representative of the consignee with the Texas City Terminal Railway Company that when the cars arrived in Texas City, they would be unloaded into storage on the premises of the Texas City Terminal (R. 103, 133); that the particular place of storage was agreed to by the Terminal and a representative of the consignee (R. 105); and that the charge for storage was to be paid to the Terminal Company by the consignee (R. 103, 133 and 296-297).

Further, in Footnote 3 on page 4 of the application, it is stated that the part of Export Freight Tariff 1916-I, which applied specifically here was that applicable to "traffic which does not leave the possession of the inland carriers until delivered to the ocean carriers or their agents". This is incorrect in that the undisputed evidence shows that the

part of the tariff which was applicable here is that part reading "on traffic which leaves possession of the inland carrier at an intermediate point or after arrival at the port of exit when application of the export rates are under such circumstances as authorized in a tariff on file with the Interstate Commerce Commission", (R. 215.)[1]

We again respectfully say that we rely primarily upon the statement of facts contained in the opinion

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NOTE 1

On page 9 of the petition, petitioner goes outside the record in this case, and states that a number of carrier cases are now pending involving the Texas City disaster. It is true that the insurance company subrogees prosecuting this present suit in behalf of petitioner, General American Transportation Corporation, have several other pending suits as subrogees. It is equally true that on the claims by other owners and subrogees (other than the companies involved in this case) it has been recognized and used as a basis of settlement that no carrier liability existed after either the expiration of free time or after unloading into storage. This was generally understood to be the rule by those handling this shipment for petitioner, by the rail carriers, and by other shippers and consignees. The general agent for both petitioner here and the consignee, J. D. Latta (the person in charge of this shipment for both of them, testified by deposition as a witness for petitioner that an inspection was made of the cargo immediately after it was unloaded into storage "to establish the railroad's responsibility" for damage to the freight (R. 136) and that he looked to the rail roads to make repair if the cargo was damaged prior to unloading into storage (R. 137) and to the terminal warehouse for damage to the cargo after unloading (R. 136). This was in substance

of the Court of Appeals which statement stands unchallenged in this Court.

Petitioner's statement of the Questions Presented begs the question in that it is assumed that no termination of the shipping contract (i. e. delivery) had occurred and free time had not expired.

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confirmed by the testimony of various witnesses that upon unloading the consignee's agent executed a delivery receipt. Mr. Sandberg, President of Texas City Terminal Railway Company, stated on unloading consignee executed a delivery receipt (R. 204-05). The other railroad employes confirmed this, (Huguet R. 173-174; Haughton, R. 186; Hester, R. 190-191; and White R. 192). Since all of the Terminal records were destroyed by the explosion (R. 173), none of these receipts could be produced and introduced in evidence. Mr. Walter, the tariff expert likewise testified that unloading into storage completed the bill of lading contract and constituted delivery (R. 216).

In addition the decision of the Court of Appeals is supported by all of the Interstate Commerce Commission rulings in point as shown by the following reported decisions of that Commission:

American Mfg. Co. v. Director General, 77 ICC Rep. 52 (1922)

Rolph, Mills & Co. v. Director General, 74 ICC Rep. 751 (1922)

A. Geisel Mfg. Co. v. Baltimore & O. RR. Co., 59 ICC Rep. 193 (1920)

The Court of Appeals decision, in addition to being correct as a matter of law, is a logical, fair, and common-sense conclusion and is in accord with industry opinion and practice and with the decisions of the Interstate Commerce Commission.

ARGUMENT.

I.

The Court of Appeals correctly held that since all of the cargo arrived on the premises on April 2, 1947 (14 days before the explosion), and since tender of delivery had been made, and valid notices of arrival had been sent and received by consignee, all on or before April 4, 1947 (12 days before the explosion), then upon the expiration of the four days free time provided in the appropriate tariffs, liability as a common carrier terminated.

The Court of Appeals held, as to the cars involved in this application, that there was a tender of delivery when the cars arrived on the Terminal property and that the notices of arrival were properly given and received by consignee, and further held that, after the expiration of the free time of four days, independent of the question of unloading, carrier liability terminated with respect to these shipments. This is particularly shown by that part of the opinion on pages 300 to 302 of the Record. This holding, finding, and conclusion of the Court of Appeals is not in any way attacked in petitioner's application on file herein except to say that if the writ is granted, additional errors will be asserted. We are rather inclined to the view that if there were any possibility of attacking this part of the opinion of the Court of Appeals, it would have been done in the application. However, in any event, no attack in this application is made upon this portion of the opinion of the Court of Appeals. Further, no valid attack could be made.

We therefore submit that, on this basis, the application should be denied.

II.

The Court of Appeals correctly held that, after the cargo was unloaded into storage, the responsibility for further movement was on the consignee, and the responsibility of the prior carriers for further move-

ment under the original contract for transportation had ceased.

Each of the cars were consigned to "French Supply Council - Transit Division - Notify J. D. Latta, 206 Cotton Exchange Building, Galveston, Texas.", with destination being stated "Galveston, Texas", (R. 7). After arrival in Galveston, Texas, the consignee then ordered the carrier holding the cars to divert them to Texas City, Texas, for unloading, this order reading as follows:

> "We attach a list of KD box car parts that we request you divert immediately to Texas City for unloading." (R. 35)

The additional facts in connection with this unloading are correctly stated in the opinion of the Court of Appeals, and it is respectfully submitted that "the liability of a common carrier ceases with delivery of the goods at the point of destination according to the direction of the shipper or consignee". (SOUTHERN ADVANCE BAG AND PAPER COMPANY VS. TERMINAL RR. ASSOCIATION, 171 SW 2d 107—Mo. Apps., 1944; ARKANSAS RR. CO. VS. WINTERS, 265 SW 967—Ark Sup., 1924; LONDON & NORTHWESTERN RY. CO. VS. BARTLETT, 7 Hurl & Nor. 400, 158 English Reports 529, 23, English Ruling Cases, page 434—1861; and BROOKS VS. PENN. RR. CO., 187 Fed. 2d 869—C.C.A., 2nd—certiorari denied. BROOKS VS. PENN. RR.—Oct. 8, 1951, U. S. Supreme Court, Law Edition Reports, Vol. 96, Advance Sheet No. 1, page 36.)

In addition, the rule is well settled that a delivery into storage, pursuant to directions of consignee, constitutes a final termination of carrier liability. This was held in PILLSBURY FLOUR MILLS CO. V. INTERLAKE S.S. CO., 40 Fed. 2d 439—C.C.A., 2nd,—1930—Certiorari denied, 282 U. S. 845; and in THE RICHARD WINSLOW, 71 Fed. 426—1896;

and in BONDY VS. AMERICAN TRANSFER CO., 115 Pac. 965—Calif. Apps.—1911; and this is particularly true where the carrier is paid only for services rendered up to the unloading, and the remaining services are paid for by the consignee, as in ARMOUR & CO. VS. ALTON R. CO., 111 Fed. 2d 913—C.C.A., 7th—1940, affirmed 312 U. S. 195; and BURTON VS. WABASH RY. CO., 58 SW 2d 443—Mo. Supreme—1933. The above cases are cited in addition to those cited in the opinion of the Court of Appeals and, we believe, control our present case. This is particularly true when it is considered that the bill of lading gave the destination as Galveston, Texas, (R. 7), and the diversion order was to Texas City "for unloading", (R. 35). The only basis for any contention for a shipside delivery is, as above noted, under the provisions of Tariff 1016-I which provide that the rates apply to shipside, (R. 294, 146), and "where such rates apply to shipside" and "under rates applying to shipside" cargo would be placed "on tracks on docks, wharves, or piers", (R. 146); but when the property was ordered into storage on the Texas City Railway Company premises by the consignee, then under the provisions of Item 360 of Tariff 1033-M, the rates were no longer applicable to shipside but, as stated in that tariff, the rates then became "the all-rail rate applicable from point of origin to the place of storage", (R. 295, 151), and thereafter, as shown by this same Item 360, the cost of storage, reloading, switching, or other expense necessary after the first unloading was to be borne by the consignee under arrangements made, and to be made, by the consignee, (R. 295, 151).

Petitioner asserts that shipside rates create an obligation to place at shipside; applying petitioner's own argument, when the rates became rates only **"to the place of storage,"** then delivery into storage only was required.

Under the above, we respectfully submit that, as shown by the opinion of the Court of Appeals, in this case, and the additional authorities also in support thereof, cited above, this application should be

denied. However, we would like to briefly refer to the arguments advanced by petitioner herein, which may be summarized into two thoughts:

1) Petitioner asserts that since the term "transportation", as defined in the Interstate Commerce Commission Act, includes storage (49 USCA 1 (3)), then that the rail common carriers are liable as common carriers under the provisions of the Interstate Commerce Act, even after the goods have been delivered into storage under applicable tariffs and by direction of the consignee.

2) That the opinion of the Court of Appeals in this case conflicts with the opinion of the Second Circuit in LEHIGH VALLEY OIL CO. VS. LYSAGHT, LTD., 271 Fed. 906.

III.

The fact that the Interstate Commerce Commission Act allows the Interstate Commerce Commission to regulate storage and the fact that the word "transportation" was defined in such act as including storage has nothing to do with the questions of termination of carrier liability, of delivery, and of liability on freight claims.

It is true that Section 1 (3) of 49 USCA defines the term "transportation" as including storage. This is with respect to the general regulatory jurisdiction of the Interstate Commerce Commission. It has nothing to do with the question of whether or not a railroad is liable as a common carrier or whether or not delivery has been made into storage. Or putting it another way, the fact that storage may be regulated by the Interstate Commerce Commission under the provisions of Section 1 (3) of the Interstate Commerce Act has nothing to do with the question of liability for freight claims.

If such a contention were correct then, under Section 1 (3) of the Act, during the process of perform-

ing any service referred to under that section, the liability of the carrier would be as a common carrier. This is simply not correct.

This same argument, as now advanced by petitioners, was advanced in EFLAND HOSIERY MILLS VS. HINES, 114 SE 472 (No. Car. Sup.—1922) and in ILLINOIS CENTRAL RR CO. VS. STIMSON, 268 SW 835 (Ky. App.—1925) and in each case denied.

The fallacy of such a contention is further shown by the multitude of cases which hold that, after the expiration of free time, the liability becomes that of warehouseman only, UNITED METALS SELLING CO. VS. PRYOR, 243 Fed. 91 (C.C.A., 8th—1917) —Cert. Denied, 245 U. S. 662; PEAVY VS. PHILADELPHIA B. & W. RR CO., 277 Fed. 333 (Dist. Col. App.—1921). In fact, one of the cases cited in the petition here is MICHIGAN CENTRAL RR CO. VS. MARK OWEN & CO., 256 US 427, which clearly recognizes and holds that upon the expiration of free time carrier liability ends. If petitioner's contention is correct, the MARK OWEN case is wrong for the reason that under the principles announced in the MARK OWEN case, after the expiration of 48 hours free time and while the property is held in storage, no carrier liability exists.

Petitioner further cites SOUTHERN RR CO. VS. PRESCOTT, 240 US 632, and other cases. As all of these cases have been clearly discussed and considered in the opinion of the Court of Appeals, we respectfully call the Court's attention to the discussion of these cases in the opinion of the Court of Appeals. Purely by way of comment, we note that on page 12, in Footnote 7, petitioner criticizes the Court of Appeals for the statement in the opinion of the Court of Appeals with respect to the PRESCOTT case that "it was conceded that the contract of carriage was ended", and petitioner states that actually the quoted words were taken from the South Carolina decision, leaving the inference that this

Court held otherwise, which this Court did not do.

Actually, this Court (240 U.S. 632, at page 635) quoted the following to show the issue before this Court:

> " * * * It, therefore, being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute under which it might have arisen is not before this court and the only question argued which we can consider is the question as to warehouseman. * * * "

It is thus clear that the only question before this Court was a question involving a warehouseman's liability and not a carrier liability.

Petitioner further contends that the Prescott Case is controlling here and in conflict with the opinion of the Court of Appeals. However, the Prescott Case involved only the question of the burden of proof of negligence in a warehouseman liability case, i. e., whether the Federal or State rule as to the burden of proof would be applicable. It was conceded in that case that the question of common carrier liability was not before this Court. The Prescott Case did not involve the question of delivery; it did not involve the question of carrier liability; and it did not involve any question in our present case. Therefore, the Court of Appeals' opinion here is not and cannot be in conflict with the Prescott Case. The Court of Appeals here correctly held that carrier liabilitty had ended. This Court of Appeals' holding cannot be in conflict with the Prescott Case holding on the question of burden of proof as to a warehouseman.

The Court of Appeals further correctly held that in the Prescott Case, the question decided was the applicability of Federal Law, as opposed to State Law, in a warehouseman case and that the Prescott

Case did not involve any question of common carrier liability. In the cases decided after the Prescott Case, involving claimed carrier liability for loss or damage to cargo, the same conclusion as to the effect of the Prescott Case has been reached as reached by the Court of Appeals in our present case, and these cases are in accord with the decision of the Court of Appeals here, UNITED METALS SELLING CO. V. PRYOR, 243 Fed. 91 (CCA-8th, 1917) cert. denied; 245 U.S. 662; SOLOMON STERN, LTD. VS. DAVIS, 292 Fed. 221 (D.C.E.D.Pa. 1930); CENTRAL OF GEORGIA RY. CO. VS. YESBIK, 92 S. E. 527 (Ga. Sup. 1917); CENTRAL OF GEORGIA RY. CO. VS. OWENS, 110 S. E. 339 (Ga.App. -1922); ILLINOIS CENTRAL R. CO. V. STIMSON, 268 S. W. 835 (Ky. App.-1925); BRIGGS HARDWARE CO. VS. AROOSTOOK VALLEY R. CO., 104 Atl. 8 (Me.Sup.-1918); CHICAGO R. I. & P. CO. V. LAWTON GRAIN COMPANY, 221 Pac. 1013 (Okla.Sup. 1923); and in other types of situations it has been uniformly held that the Prescott Case involved the question of liaility as a warehouseman; LAKE UNION DRY DOCK & MACHINE WORKS VS. UNITED STATES, 79 Fed. 2d 802 (C.C.A.-9th-1935) and DELAWARE DREDGING CO. VS. GRAHAM, 43 Fed. 2d 852 (D.C.E.D., Pa. 1930).

In fact, all of the cases cited by petitioner under this point may be summarized as only holding that the Federal law is applicable here, but none of them are applicable to, decide, or involve, the questions of when carrier liability terminates, of when delivery is made or any other question of carrier liability involved in our present situation.

We, therefore, respectfully submit that petitioner's position in this respect is untenable.

IV.

The opinion of the Court of Appeals in this case is not in conflict with the opinion of the Court of

Appeals for the Second Circuit in LEHIGH VALLEY OIL CO. VS. LYSAGHT, 271 Fed. 906.

Briefly, we desire to call the Court's attention to the following facts which clearly show that the LYSAGHT case is not in conflict with the opinion of the Court of Appeals in our present case:

A) The Court of Appeals in our present case has held that valid notices of arrival and tenders of delivery were made on or prior to April 4 (12 days before the explosion) and that free time had expired long before the explosion. This holding and finding has not been attacked as grounds for this application for writ of error. In the LYSAGHT case no such notices of arrival or tender had been made, and the questions here presented were not involved in that case.[2]

B) In our present case the Court of Appeals has held under the facts that the responsibility of the carriers here for further movement under the original contract for transportation ceased and ended when the goods were unloaded into storage, (R.

NOTE 2

Petitioner states on page 15 of its petition as to the LYSAGHT Case that "By a provision of the bill of lading which reduced carrier liability following a specified period after notice of arrival 'at destination or at port of export' and by a tariff provision, the liability of the carrier during the holding period had been reduced to that of warehouseman", leaving the implication that the facts in the LYSAGHT case involved proper notices of arrival at destination or port of export, and the expiration of free time similar to our present case. This implication and statement is incorrect in that under the facts of the LYSAGHT case, no question was presented as to notices of arrival at destination or consequent free time resulting therefrom.

303), and liability as a carrier for the interstate transportation under the original contract had come to an end (R. 306). Or, putting it another way, that delivery into storage was a final termination of carrier liability under the original contract and a final delivery. As shown by the Court of Appeals' opinion and the cases cited herein this opinion is correct. Since delivery into storage here constituted a final termination of the carrier liability under the bill of lading and tariffs, the question of the effect of a new order by the consignee to the Terminal Company, after delivery, involving new charges cannot affect the question at all. Or, in other words, since delivery into storage here is a final termination of carrier liability, this case does not involve, and it is immaterial here, as to effect of subsequent contracts between the consignee and the Terminal Company. In the LYSAGHT case, it was assumed, for the basis of decision, that there had been no final termination of carrier liability. To say that the Court of Appeals' opinion here and the LYSAGHT opinion are in conflict is to say, without a consideration of the facts in either case that every decision in which, under the facts of that particular case, it has been held that delivery occurred is in conflict with every other decision which, under the facts of the particular case, has held no delivery. Whether or not a delivery or final termination of liability has occurred is dependent upon the facts of the particular case. None of the facts upon which the Court of Appeals here held that a final termination of carrier liability under the original contract and tariffs had occurred were present in the LYSAGHT case and there is, and can be, no conflict in the two decisions.

C) In the LYSAGHT case, as stated by the Court of Appeals in our present case, the tariff provided that shipments could be held in route at Jersey City, N. Y., "until receipt of written order for disposition from consignee", and that during such time and before the receipt of a written order of disposition,

the carrier should be liable only if negligent; and, as stated by the Court of Appeals here, "The tariff thus fixed the exact time for carrier liability to be reinstated". The substance of this same statement is made by the Court itself in the LYSAGHT case. In that case the Court held, as to reinstatement of carrier liability: "This is expressly stated by A-1 of the Company's tariff". There is no such provision involved in our present case; in fact, the tariff provisions here are entirely different and contrary; and, as a matter of fact, as held by the Court of Appeals in our present case, the property had reached destination and valid notices of arrival had been given, which holding by the Court of Appeals is unchallenged here.

D) The facts in the LYSAGHT case are entirely different in that in the LYSAGHT case, the goods were shipped to New York for export, including lighterage, and were held en route at Jersey City, N. J. As stated in the opinion of the Court of Appeals in our present case, with respect to the LYSAGHT case, "Another important distinction is that there, clearly, the shipment could not be said to have reached its destination", whereas, here in our present case, the shipment had reached its destination.

E) In the LYSAGHT case the interstate transportation had not come to an end and the carrier, upon receipt of order to forward the shipment, was under duty to so forward the shipment. In our present case, consignee diverted the goods to Texas City "for unloading" which unloading exhausted the entire rail rate charged, the storage arrangement at Texas City was between the consignee and the Texas City Terminal Railway Company, and the storage charges and all other charges thereafter were to be paid by the consignee who would also direct when and to where the cargo would be reloaded and switched.

F) In our present case, the only basis for any obligation to deliver shipside is the fact that the rail-

rates apply to shipside under the original tariffs, but these same tariffs also provide that in the event of unloading into storage, the rail rate was exhausted. This situation did not exist in the LYSAGHT case in any manner.

G) In the LYSAGHT case the cargo had to be transported from Jersey City, N. J., to Pier 69 North River, New York, N. Y. In our present case the only switching to be done was the short distance within the Terminal premises; and in the only case in point, this switching has been held to be a mere switching operation only. See SOUTHWEST NATIONAL BANK OF DALLAS VS. MKT. RR. CO. OF TEX., 18 SW 2d 807 (Tex. Civ. App.—1929—Error refused by Texas Supreme Court).

For these many reasons, and further because the LYSAGHT case on its facts is not in any manner in point, we respectfully submit that there is no conflict between the opinion of the Court of Appeals in our present case and the opinion of the Court in the LYSAGHT case.

CONCLUSION.

It is respectfully submitted that there is no conflict in the decision and opinion of the Court of Appeals in this case and the decisions of this Court; that there is also no conflict with the decision of the Court of Appeals in the LYSAGHT case; and that the decision here does not establish an erroneous precedent, but, on the contrary, only reaffirms and is in accord with the well recognized rules of law applicable to our present fact situation.

It is respectfully submitted that the opinion and judgment of the Court of Appeals is correct, both as shown by the opinion of the Court itself and by the additional authorities cited herein.

It is respectfully submitted that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

Indiana Harbor Belt Railroad Company and Baltimore and Ohio Chicago Terminal Railroad Company, Respondents.

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